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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 163

KOMATZ CONSTRUCTION, INC.,

Petitioner,

vs.

WESTERN UNION TELEGRAPH COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Justices of the Supreme Court of the United States:

Respondent opposes the petition for a writ of certiorari to review the judgment of the Minnesota Supreme Court (Minn. , 186 N. W. 2d 691) which affirmed the trial court's grant of partial summary judgment to respondent. The judgment limited to $500.00 respondent's liability, if any, for damages which petitioner may have suffered from an alleged delay in delivering petitioner's telegram, sent at the "unrepeated message rate". The Minnesota Supreme Court based its affirmance on the va-

lidity and applicability of respondent's tariff, filed with the Federal Communications Commission, which limits respondent's liability for an unrepeated message to $500.00. The well reasoned, comprehensive opinion of the Minnesota Supreme Court disposed of all of petitioner's contentions in complete accord with prior decisions of this Court, and petitioner shows no special or important reasons why its petition for a writ of certiorari should be granted.

The Statute Involved

In addition to the sections of the Communications Act of 1934, Title 47 U.S.C., cited by petitioner (P. 2), respondent relies on Sections 151 and 205(a) of that statute.

> § 151. Purposes of chapter; Federal Communications Commission created.
>
> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as

hereinafter provided, and which shall execute and enforce the provisions of this chapter.

10 U.S.C. 1964 ed. 8963, 47 U.S.C.A. Sec. 151.

§ 205. Commission authorized to prescribe just and reasonable charges; penalties for violations.

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

10 U.S.C. 1964 ed. 8971, 47 U.S.C.A. Sec. 205(a).

The Question Presented

Does the limitation of liability for an unrepeated message in respondent's tariff, filed with the Federal Communications Commission, bar plaintiff from a recovery of damages in excess of $500 under the facts of this case.

Statement of Facts

As petitioner urges that respondent should be equitably estopped from relying on the applicable limitations of liability contained in its filed tariff (P. 4, 8, 9,*) it is necessary to supplement the statement of facts contained in the Petition. While the facts giving rise to the claimed estoppel are sparsely developed, they all relate to the filing of petitioner's message for transmission with Norman Schmidt, an employee of the Nicollet Hotel which was the agent of respondent in St. Peter, Minnesota. Petitioner predicates the estoppel on the alleged failure of respondent to acquaint its agent with various rates or methods of transmission or warn the public against the risks of the service (P. 9). However, on a deposition of Mr. Schmidt, taken prior to the final disposition of the motion for summary judgment, he testified that if any question concerning company procedure was asked of him by a sender as to which he did not know the answer, he would call the full-time office at Mankato for instructions (p. 17, respondent's brief below). The Minnesota trial court examined this deposition (P. 30) before making its order and judgment and found "The deposition of agent Schmidt negatives liability based upon his negligence in the initial dealing with plaintiff's agent or the possibility of an estoppel." (P. 31)

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* Numbers prefaced by the letter P refer to the pages of the Petition for a Writ of Certiorari.

ARGUMENT

I.

The Court should decline jurisdiction in accordance with the doctrine of primary jurisdiction.

Petitioner in effect asks this Court to invalidate as unreasonable and outdated so much of respondent's tariff, filed with the Federal Communications Commission, as limits respondent's liability for the handling of an unrepeated message to $500.00. Respondent submits that this Court should decline to exercise its discretionary jurisdiction in accordance with the doctrine of primary jurisdiction. This Court has traditionally refrained from initially deciding such issues as the reasonableness of tariffs in a regulated industry until the administrative agency charged with the regulation of the industry involved has first had an opportunity to evaluate the matter.

Far East Conference v. *United States*, 342 U. S. 570, 574-575 (1952) defined the doctrine of primary jurisdiction as:

> ". . . a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more ra-

> tionally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

Southwestern Sugar & Molasses Company, Inc. v. *River Terminals Corp.*, 360 U. S. 411 (1959), sustained the principle that the validity of a tariff provision exculpating from its own negligence a water carrier certificated under the Interstate Commerce Act should initially be passed upon by the Interstate Commerce Commission. This Court observed at 420:

> "We may assume that the question whether a clause of this kind offends against public policy is one appropriate ultimately for judicial rather than administrative resolution. But that does not mean that the courts must therefore deny themselves the enlightenment which may be had from a consideration of the relevant economic and other facts which the administrative agency charged with regulation of the transaction here involved is peculiarly well-equipped to marshal and initially to evaluate."

Telegraph communications are governed by a refined statutory scheme and are subject to continuous administrative review. Sec. 205(a) of the Communications Act of 1934 empowers the Federal Communications Commission to determine after due hearings, "what will be the just and reasonable charge . . . to be thereafter observed, and what classification, regulation or practice is or will be just, fair and reasonable, to be thereafter followed. . . ."

It is therefore particularly appropriate that a question involving the reasonableness of a filed communications tariff and the resulting economic impact of any change thereof should initially be considered by the Federal Communications Commission. Cf. *Carter* v. *American Telephone & Telegraph Company*, 365 F. 2d 486 (C. A. 5, 1966), cert. den. 385 U. S. 1008 (1966).

II.

All federal questions of substance decided by the Minnesota Supreme Court have been previously determined by this Court and the Minnesota Supreme Court correctly interpreted and applied the prior decisions of this Court.

To bring itself within the purview of Rule 19.1(a) of the Rules of this Court, petitioner argues (P. 6) that the Minnesota Supreme Court erroneously interpreted prior decisions of this Court and in effect decided a federal question of substance not heretofore determined by this Court. Yet, as petitioner's argument soon shows, the error complained of does not lie so much in an erroneous extrapolation of prior decisions into undecided areas but in the faithful adherence by the Supreme Court of Minnesota to prior decisions of this Court which are squarely in point, particularly *Western Union Telegraph Company* v. *Esteve Brothers & Company*, 256 U. S. 566 (1921) and *Western Union Telegraph Company* v. *Priester*, 276 U. S. 252 (1928). These decisions sustained the limitation of liability in Western Union's tariff on the ground that uniform and equal rates for all were secured thereby, without unjust, undue or unreasonable preference, prejudice, discrimination or advantage.

The main thrust of petitioner's argument, however, is that an age which has seen the virtual demise of sovereign immunity should also put an end to the limitation of liability under which respondent operates by virtue of its tariffs. This should be done, it is argued, because "[o]ther carriers who are engaged in interstate commerce, such as airlines and railroads, are not afforded the same immunities" (P. 7) and the risk of loss is more easily borne by respondent than its customers. The argument is deficient in logic and fact. To begin with, limitation of liability is recognized as a useful economic device by public bodies and in private contracts. It is common in air, water, rail and motor transport, communications and other industries. It sustains its continued viability from the fact that in numerous instances public transportation and communication services can be rendered to the public at low cost only if the carrier is protected against potentially ruinous damage claims—real, fancied or collusive—arising out of the services rendered, because the charge for such services made to the public is wholly incommensurate to the potential damage risks to which the carrier exposes itself in undertaking such services. This does not leave the user helpless or unprotected. For appropriate higher charges, the user can usually protect himself against mishap—in the case of telegraph services through the use of repeated* or val-

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*In transmitting a "repeated message", the message is telegraphed back by the receiving office to the sending office for comparison and correction. If a repeat-back is not seasonably received by the sending office, it again contacts the intended receiving office. The procedure is described in *Nolte Brass Foundry Co. v. Western Union Telegraph Co.*, 38 F. 2d 838 (D.C. Ohio, 1930).

ued messages.* The tariff limitations involved here have existed for 50 years and neither Congress nor the Federal Communications Commission has deemed it appropriate to change the limitation. Respondent has filed identical tariff provisions with the appropriate commissions in all of the 48 contiguous states except for Michigan, Minnesota and Texas which have no commissions regulating such communication services. These tariff limitations have been upheld repeatedly by the federal and state courts and its validity is not open to serious doubt. Cf. *Western Union Telegraph Company* v. *Nester,* 309 U. S. 582, 588 (1940). The alternative proposed by petitioner would have far reaching effects not only on the telecommunications industry but on many other public service industries as well. Protecting all users against all risks in the service provided, without limitation, both those who are content to bear such risks and those who are not, at a flat rate for all, will raise the cost of public service to levels where it is likely to be available to but few. This is not the policy established by the Communications Act of 1934 (47 U. S. C. §151).

Petitioner also appears to contend (P. 7) that its damages are subject to no limitation because neither the $5,000. limitation applicable to repeated messages nor the unlimited protection available through the use of the valued

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* The unrepeated rate for the transmission of the telegram provides that Western Union's exposure to liability may be as much as $500.00. The user may increase respondent's liability to $5,000.00 for any damage he may suffer by using a repeated message; the additional charge for this special handling is one half of the unrepeated message rate. Respondent will assume liability in any amount (over $5,000.00) to the amount by which the user values the message at the time of transmission, the rate for such message being 1/10 of one percent of the user's valuation above $5,000.00.

message afford it adequate protection in the premises. This is allegedly so because repeat messages may protect against in accuracy but not against delay and valued messages provide no protection as the message here cannot be valued. Both of these arguments have already been rejected by the courts.

The claim that a repeated message affords no protection against delay was rejected in the carefully considered opinion in *Western Union Telegraph Co.* v. *The Abbott Supply Company*, 45 Del. (6 Terry) 345, 74 A. 2d 77 (1950). The practical effect which repeating a message has in minimizing both error and delay (see also P. 5) is adverted to in the *Second Unrepeated Message Case*, 61 I.C.C. 541, 548 (1921) pursuant to which respondent filed its present form of tariff:

> "The repetition is but one additional element of the total service, and its cost, therefore, a relatively small proportion of the original cost, while the charge is 50 per cent higher. This additional amount is compensation for the greater care in handling and the extra liability assumed * * *. The fact that repetition is ordered should put the company on notice that the message is of unusual value, and thus insure the maximum degree of care in its transmission and delivery."

As to the argument that petitioner cannot value its message, this Court wrote in *Western Union Telegraph Company* v. *Czizek*, 264 U. S. 281, 283 (1924): "The plaintiff finds no difficulty in valuing the message now. It was at least equally possible to value it when it was sent. See *Western Union Telegraph Co. v. Estere Bros. & Co.*, 256 U. S. 566, 574; *Postal Telegraph-Cable Co.* v. *Warren-Godwin Lumber Co.*, 251 U. S. 27."

Respondent did not originate the message classification or limitation of liability involved here. Section 201 (b) of the Communications Act of 1934 (P. 2) specifically provides for the unrepeated and repeated message classifications involved here and allows different charges to be made for the different classes of communications. The wording of the present limitation clause was derived from, and filed pursuant to, an Opinion and Order which the Interstate Commerce Commission entered after hearing the *Second Unrepeated Message Case*, 61 I.C.C. 541 (1921). The penultimate paragraph of the Opinion in that case reads (550):

> "Upon consideration of the record we find that the present rules of the respondents restricting their liability for negligence in the transmission or delivery, or for non-delivery, of unrepeated and repeated interstate messages are and for the future will be unreasonable; that the maximum liability in the case of a message for the transmission of which the unrepeated rate is charged should be not less than $500, and for a message received for transmission at the repeated rate, $5,000, which limitations we find to be reasonable as parts of the respective rates: Provision should be made for the transmission of valued messages under a liability limited to the value stated in writing by the sender of the message at the time it is offered for transmission upon payment of the repeated rate plus one-tenth of 1 per cent of the stated value in excess of $5,000."

III.

Equitable estoppel may not be relied on to change the charges, practices, classifications and regulations established by a tariff filed pursuant to law.

The Minnesota Supreme Court did not err in refusing to apply a state doctrine of equitable estoppel. It properly held (P. 23) that the application of the doctrine would violate the requirement of uniformity and equality of rates and would result in the giving of a preference. This Court has repeatedly held the doctrine of estoppel to be inapplicable to tariffs having the force of law. In *Chesapeake & Ohio Railway Company* v. *Martin*, 283 U. S. 209, 222 (1931) (and in earlier cases cited therein), involving a similar provision in the Interstate Commerce Act, this Court held that "the shipper may not invoke the doctrine of estoppel against the right to collect the legal rate, because to do so would be to avoid the requirement of the law as to equal rates."

Tariff provisions are binding irrespective of knowledge or notice as they have the force of law. *Western Union Telegraph Company* v. *Esteve Brothers & Company*, 256 U. S. 584 (1921). See also *American Railway Express Co.* v. *Daniel*, 269 U. S. 40 (1925) which held that patrons of regulated services of carriers and utilities were bound as a matter of law to know the provisions of applicable filed tariffs.

There is no merit in petitioner's contention that the Minnesota court violated the Rules of Decision Act, as interpreted by *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64 (1938), in refusing to apply the doctrine of equitable estoppel. *Erie* did not change the rule that interstate and foreign message transactions are governed by federal law to the exclusion of conflicting state law. Cf.

Sola Electric Co. v. *Jefferson Electric Co.*, 317 U. S. 173 (1942), citing with approval *O'Brien* v. *Western Union Telegraph Company*, 113 F. 2d 539 (C. C. A. 1, 1940) and, as already shown, federal law does not permit estoppel to change the effect of tariff provisions.

CONCLUSION

The Court should not grant a Writ of Certiorari.

Respectfully submitted,

ERNEST WALTON,
GEORGE T. VOGEL,
Attorneys for Respondent Western Union Telegraph Company,
60 Hudson Street,
New York, N. Y. 10013

Of Counsel:

RICHARD C. HOSTETLER,
60 Hudson Street,
New York, N. Y. 10013.

ARTHUR H. OGLE,
BLETHEN, OGLE, GAGE & KRAUSE,
P.O. Box 1058,
Mankato, Minnesota 56001.